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In the

Supreme Court of the United States

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TERRY L. STEWART, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

ROBERT DOUGLAS SMITH,

Respondent.

♦

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

♦

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I

(A) DOES THE REQUIREMENT OF AKE V. OKLAHOMA, 470 U.S. 68 (1985), THAT A STATE PROCEDURAL RULE BE INDEPENDENT OF FEDERAL LAW TO CONSTITUTE AN ADEQUATE AND INDEPENDENT STATE GROUND, APPLY IN HABEAS CORPUS PROCEEDINGS UNDER 28 U.S.C. §2254?

(B) IS THERE A CONFLICT IN THE COURTS OF APPEALS ON THIS ISSUE?

(C) DOES THE NINTH CIRCUIT'S HOLDING THAT A DETERMINATION OF WHETHER A POST-CONVICTION CLAIM IS OF "SUFFICIENT CONSTITUTIONAL MAGNITUDE" IS NOT INDEPENDENT OF FEDERAL LAW UNDER AKE V. OKLAHOMA, SUPRA, CONFLICT WITH THE LAW OF THE SIXTH, SEVENTH AND TENTH CIRCUITS?

II

(A) DID THE NINTH CIRCUIT MISINTERPRET RULE 32.2(a)(3) AND ARIZONA LAW IN FINDING THAT APPLICATION OF THE RULE REQUIRES A DETERMINATION OF THE CONSTITUTIONAL MAGNITUDE OF A POST-CONVICTION CLAIM?

(B) DID THE NINTH CIRCUIT CORRECTLY HOLD THAT THE ARIZONA COURTS DID NOT CLEARLY AND EXPLICITLY RELY ON A PROCEDURAL RULE IN DENYING RESPONDENT'S INEFFECTIVENESS CLAIM, AND THAT THERE WAS THEREFORE NO INDEPENDENT STATE GROUND FOR THE DENIAL OF THE CLAIM?

(C) DID THE NINTH CIRCUIT ERR IN REFUSING TO CERTIFY A QUESTION OF ARIZONA STATE LAW TO THE ARIZONA SUPREME COURT?

III

HAS THE COMMON LAW PROCEDURAL DEFAULT RULE OF WAINWRIGHT V. SYKES, 433 U.S. 72 (1977) BEEN SUPERSEDED, IN ARIZONA CASES, BY 28 U.S.C. § 2264, UNDER WHICH PETITIONER IS PLAINLY ENTITLED TO FEDERAL CONSIDERATION OF HIS CONSTITUTIONAL CLAIMS BECAUSE ARIZONA DID NOT AFFORD HIM THE POSTCONVICTION REPRESENTATION IT HAS OBLIGATED ITSELF TO PROVIDE IN ORDER TO "OPT IN" TO CHAPTER 154 OF THE AEDPA?

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IN THE

SUPREME COURT OF THE UNITED STATES

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully prays that Petitioner's Petition For Writ Of Certiorari to review the judgment below be denied.

♦

OPINIONS BELOW

The opinion of the Ninth Circuit Court Of Appeals appears at Appendix A to the Brief in Opposition and is reported at Smith v. Stewart, 241 F.3d 1191 (9th Cir. 2001).

The Order of the United States District Court of Arizona denying the Supplemental Petition appears at Appendix B to the Brief In Opposition and is unpublished. Smith v. Lewis, (No. CIV 87-234 TUC RMB filed October 31, 1996.)

The Decision of the United States District Court of Arizona denying the Amended Petition appears at Appendix C to the Brief in Opposition and is unpublished. Smith v. Lewis (filed September 5, 1996.)

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JURISDICTION

The date on which the Ninth Circuit Court of Appeals decided the case was March 6, 2001.

A Petition For Rehearing and Suggestion For Rehearing En Banc filed by Petitioner was denied by the Ninth Circuit Court of Appeals on May 15, 2001, and a copy of the order denying rehearing appears at Appendix D.

The jurisdiction of this Court is under 28 U.S.C. §1254(1).

♦

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure:

Rule 32.2. Preclusion of remedy

a. Preclusion. A defendant shall be precluded from relief under this rule based upon any ground:

• • •

(3) That has been waived at trial, on appeal, or in any previous collateral proceeding.

Ariz. R.Crim.P. 32.2(a)(3).

2. Comment to Rule 32.2 (a)(3) of the Arizona Rules of Criminal Procedure:

The pre-1992 version of Rule 32.2(a)(3) indicated that a defendant must "knowingly, voluntarily and intelligently" not raise an issue at trial, on appeal, or in a previous collateral proceeding before the issue was precluded. See, Faye v. Noya, (sic) 372 U.S. 392 (1963). While that is the correct standard of waiver for some constitutional rights, it is not the correct standard for other trial errors. Accordingly, some issues not raised at trial, on appeal, or in a previous collateral proceeding may be deemed waived without considering the defendant's personal knowledge, unless such knowledge is specifically required to waive the constitutional right involved. If an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant "knowingly, voluntarily and intelligently" waived the claim. For most claims of trial error, the state may simply show that the defendant did not raise the error at trial, on appeal, or in a previous collateral proceeding, and that would be sufficient to show that the defendant has waived the claim. If defense counsel's failure to raise an issue at trial, on appeal or in a previous collateral proceedings (sic) is so egregious as to result in prejudice as that term has been constitutionally defined, such failure may be raised by means of a claim of ineffective assistance of counsel.

Ariz.R.Crim.P. 32.2(a)(3), cmt.

♦

STATEMENT OF THE CASE

On March 30, 1982, a Pima County, Arizona jury found Respondent and his codefendant, Joseph Lambright, guilty of the offenses of kidnapping, sexual assault and first degree murder of Sandra Owen on March 11, 1980. (Apps. E and F.) On May 27, 1982, the trial court sentenced Respondent to death on the murder conviction. (App. E.) Lambright was also sentenced to death. (App. F.) In companion decisions dated September 23, 1983, the Arizona Supreme Court affirmed the convictions and death sentences of both defendants. (Apps. E and F.)

On April 20, 1984, Respondent filed his first Petition For Post-Conviction Relief under Rule 32 of the Arizona Rules of Criminal Procedure ("Rule 32 Petition") in state court. (App. C at C-3.) The first Rule 32 Petition was denied on April 17, 1985, and the Arizona Supreme Court denied review. (Id.)

On April 14, 1987, Respondent filed a Petition For Writ Of Habeas Corpus under 28 U.S.C. §2254 in the United States District Court for the District of Arizona in Tucson, Arizona. (Id.) Because the Petition continued a number of unexhausted claims on December 14, 1988, the District Court dismissed the Petition without prejudice so that Respondent could exhaust his unexhausted claims in state court. (Id.)

On December 8, 1989, Respondent filed his second Rule 32 Petition. (Id.) On August 8, 1991, the trial court denied the second Rule 32 Petition, and the Arizona Supreme Court denied review. (Id.) On January 3, 1994, Respondent filed an Amended Petition in District Court which included the claims raised in the second Rule 32 Petition. (Id.)

In all of the foregoing proceedings, Respondent was represented by attorneys of the Office of the Pima County Public Defender in Tucson, Arizona. (App. A at A-4.)[1] In September of 1994, Respondent wrote a letter to Judge Richard M. Bilby, the judge presiding over Respondent's federal habeas proceedings, and told him that he wished to raise claims of ineffective assistance of counsel relating to his trial and sentencing counsel, but that his present counsel, John Palumbo, had told him that he could not raise such a claim because trial counsel was a member of his Office. (Id. at A-4, A-5.) Respondent requested in the letter that Judge Bilby appoint an attorney to "work with" Palumbo and represent him on claims of ineffective assistance of counsel against his trial counsel. (Id. at A-5.) Judge Bilby granted Respondent's request and appointed undersigned counsel S. Jonathan Young, a private attorney, to represent Respondent on his ineffectiveness claims. (Id.)

[1] Thomas Hippert represented Respondent at trial and sentencing. Lawrence Fleicshman represented Respondent on direct appeal and the first Rule 32 Petition. John Palumbo represented Respondent on his second Rule 32 Petition and on his initial and Amended Habeas Petitions. (App. B at 1-2.)

On June 9, 1995, undersigned counsel Young filed a third Rule 32 Petition raising numerous claims and allegations of ineffective assistance of counsel by the Public Defender's Office, including a claim that Respondent's trial counsel rendered ineffective assistance during his sentencing proceedings. (Id.) The Petition contained an affidavit by John Palumbo that the Pima County Public Defender had a policy that prohibited its attorneys from alleging ineffectiveness of other attorneys in the office. (App. A at A-5.) The trial court denied the third Rule 32 Petition, however, and the Arizona Supreme Court denied review. (A at A-5; App. G; App H.)

On August 23, 1996, undersigned counsel Young filed a Supplemental Petition For Writ Of Habeas Corpus and Supporting Memorandum raising Respondent's ineffectiveness claims. (App. A at A-5; App. B)

In an Amended Memorandum Opinion And Order dated September 5, 1996, the District Court denied the Amended Petition For Writ Of Habeas Corpus and Respondent's non-ineffectiveness claims. (App. C.) In an Order dated October 30, 1996, the District Court denied the Supplemental Petition For Writ Of Habeas Corpus and Respondent's ineffectiveness of counsel claims on the ground that those claims were procedurally defaulted. (App. B.)

On appeal to the Ninth Circuit, the court granted relief on one of Respondent's trial claims (dual jury issue), but the court granted Petitioner's Motion For Rehearing En Banc and reversed that ruling. See, Lambright v. Stewart, 191 F.3d 1181 9th Cir. 1999). The court then remanded the case to the original panel for consideration of Respondent's remaining trial and sentencing claims. Id. In Smith v. Stewart, 241 F.3d 1191 (2001), the court granted relief on Respondent's claim of ineffective assistance of counsel at sentencing, holding that there was "no doubt" that Respondent had established a colorable claim on that issue, and that the state court had erred in denying Respondent's request for an evidentiary hearing on that issue. (App. A at A-11 to A-17.)[2] The court therefore ordered that the case be remanded

[2] The evidence of ineffective assistance relied upon by the Ninth Circuit was, *inter alia*, (i) counsel's failure to investigate, or present evidence of, Respondent's "miserable" childhood, mental disabilities and mental impairment at the time of the offense, (ii) his sole and inexplicable]" reliance on the immunity agreement obtained by the State's primary witness, and the "great loss" suffered by

to the District Court for an evidentiary hearing on the claim of ineffective assistance at sentencing. (Id. at A-17.)[3] In reaching the merits of Respondent's ineffectiveness at sentencing claim, the court held that the District Court had erred in finding that Respondent's claims were procedurally defaulted, because there was no independent state ground for the Arizona courts' denial of the claim. (Id. at A-7 to A-11.)[4]

Petitioner filed a timely Petition For Rehearing and Suggestion For Rehearing En Banc of the foregoing decision in Smith v. Stewart, and that Petition was denied by Order dated May 15, 2001. (App. D.) On August 13, 2001, Petitioner filed a timely Petition For Writ of Certiorari in this Court.

♦

REASONS FOR DENYING THE WRIT

Respondent respectfully requests this Court to deny the Writ for the following reasons.

I

A

The Ninth Circuit Correctly Relied Upon the "Independent State Procedural Rule" Requirement Of Ake v. Oklahoma In The Habeas Proceedings In This Case.

Petitioner contends that the Ninth Circuit's reliance upon the "independent state procedural rule" requirement of Ake v. Oklahoma, 470 U.S. 68 (1985), to find that there was no procedural default of Respondent's claim was error, and conflicts with a decision of the Fourth Circuit which addressed the

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the victim's family, as reasons not to impose death, and (iii) his "rambling" explanation of his own moral opposition to the death penalty. (App. A at -4, 11-17.) The court described counsel's performance in the sentencing proceedings as "woefully inadequate". (Id. at 13.)

[3] The court denied relief on all of Respondent's other claims in a separate unpublished opinion. See Lambright v. Stewart, 2001 WL 228668.

[4] In light of its holding that there was no independent state ground for the denial of the claim, the court stated that there was no need to address Respondent's argument that the policy of the Pima County Public Defender preventing its attorneys from attacking the competency of any other attorney in the office was an "external" and "objective factor" constituting cause and prejudice for the procedural default. (Id. at A-7, A-8, n.3.) The court stated, however, that the argument "appears to have merit", citing Manning v. Foster, 224 F.3d 1129, 1134 (9th Cir. 2000.) (Id.)

issue of whether Ake, a direct review case, applies in habeas proceedings under 28 U.S.C.§2254. (Pet. for Cert. at 7-15.) This contention is incorrect.

Petitioner's contention that Ake does not apply in habeas proceedings is based entirely on the following language in Coleman v. Thompson, 501 U.S. 722 (1991), concerning Ake:

> **Ake was a direct review case. We have never applied its rule regarding independent state grounds in federal habeas. But even if Ake applies here, it does Coleman no good because the Virginia Supreme Court relied on an independent state procedural rule.**

504 U.S. at 741. This language is dicta on the issue of whether Ake applies to habeas proceedings, as this Court effectively held that it did not have to decide that issue given the Virginia procedural rule's independence of federal law. An examination of this Court's habeas decisions shows that the "independent state procedural rule" requirement of Ake does apply in habeas.

In Wainwright v. Sykes , 433 U.S. 72 (1977), this Court held that the doctrine of "adequate and independent state ground" applies in habeas proceedings, and allowed a federal court to refuse to review a constitutional claim because the state court had declined to rule on the claim due to the petitioner's failure to comply with a state procedural rule, and the state court ruling was therefore not "independent" federal law. 433 U.S. at 81-87. This Court held that:

> **We therefore conclude that Florida procedure did, consistently with the United States Constitution, require that respondents' confession be challenged at trial or not at all, and thus his failure to timely object to its admission amounted to an independent and adequate state procedural ground which would have prevented direct review here. See, Henry v. Mississippi, 379 U.S. 433, 85 S.Ct. 5644, 13 L.Ed.2d 408 (1965).**

Id. at 86-87, emphasis added. This Court's reliance on Henry v. Mississippi, 379 U.S., 433 (1965), a direct review case, to hold in Sykes that the adequate and independent state ground doctrine applies in habeas cases, is an early indication that this Court intended the doctrine to have equal and coextensive application in direct review and habeas cases.

In County Court Of Ulster County, New York v. Allen, 442 U.S. 140 (1979), this Court relied upon Wainwright v. Sykes, supra, and recognized the existence of the adequate and independent state ground doctrine in habeas proceedings, but reached a different result than Sykes. This Court held that New York's contemporaneous objection rule was not an independent state ground for the denial of the

petitioner's claim because, unlike Sykes, it had not been shown that New York law required a contemporaneous objection to this type of instructional error, or that the state court had relied on any such state procedural rule in denying the claim. Id, at 147-154. In so applying the independent state ground doctrine, this Court stated that:

> **Our conclusion that it was proper for the federal courts to address respondents' claim is confirmed by the policies informing the "adequate state ground" exception to habeas corpus jurisdiction. The purpose of that exception is to accord appropriate respect to the sovereignty of the States in our federal system. Wainwright v. Sykes, 433 US, at 88, 53 L.Ed.2d 594 97 S.Ct. 2497. But if neither the state legislature nor the constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim.**

Id. at 154, footnote omitted, emphasis added. In holding that the adequate and independent state ground doctrine applies throughout "our federal system", this Court again indicated that the doctrine applies equally and coextensively in direct review and habeas cases.

It was in Harris v. Reed, 489 U.S. 255 (1989), however, that this Court first specifically held that a direct review case relating to the independent state ground doctrine applied equally and coextensively to a habeas case. In Harris, this Court held that the "plain statement" rule established in Michigan v. Long, 463 U.S. 1032 (1983), and Caldwell v. Mississippi, 472 U.S. 320 (1985), both direct review cases, applied equally to habeas cases. 489 U.S. at 257-266. In Long, this Court held that when it is presented with a federal constitutional issue on direct review, it will find jurisdiction to review the claim:

> **in the absence of a plain statement that the decision below rested on an adequate and independent state ground.**

463 U.S. at 1043. This Court also held that when faced with an ambiguous state court decision, it will presume that no adequate and independent state ground was relied on, and will review the federal claim. Id. at 1042.[5] In Caldwell v. Mississippi, supra, this Court held, relying on Long, that in determining

[5] This Court summarized the plain statement rule in Long as follows:

> **In determining, as we must, whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds, we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground**

whether jurisdiction exists on direct review:

> **[...W]e will not assume that a state-court decision rests on adequate and independent state grounds when the "state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." Michigan v. Long, 463 US 1032, 1040-1041[.] "If the state court decision clearly and expressly indicates that it is alternatively based on bona fide separate, adequate and independent grounds, we, of course, will not undertake to review the decision." Id., at 1041[.]**

472 U.S. at 327.

In applying "plain statement" rule and presumption of no independent state ground of Long and Caldwell to habeas cases, Harris establishes that decisions of this Court relating to the adequate and independent state ground doctrine apply equally and coextensively to habeas cases. As stated in Harris:

> **Although Long and Caldwell arose on direct review, the principles underlying those decisions are not limited to direct review. Indeed, our opinion in Caldwell relied heavily upon our earlier application of the adequate and independent state ground doctrine to habeas review in Ulster County. See Caldwell, 472 US, at 327-328, 86 L Ed 2d 231, 105 S Ct 2633. Caldwell thus indicates that the problem of ambiguous state-court references to state law, which led to the adoption of the Long "plain statement" rule, is common to both direct and habeas review. Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar. Caldwell, 472 US, at 327, 86 L Ed 2d 231, US, at 1041, 77 L Ed 2d 1201, 103 S Ct 3469.**

489 U.S. at 263, footnote omitted.

In Coleman v. Thompson, 501 U.S. 722 (1991), this Court reaffirmed its decisions in Sykes, Ulster County and Harris, supra, and held that the adequate and independent state ground doctrine applies in habeas cases, as well as direct review cases. 501 U.S. at 729-730. In so holding, this Court discussed the question of whether the doctrine applied differently in habeas cases than it does in direct review cases. Id. at 730. This Court observed that one difference between direct review and habeas cases is that in the former case it is reviewing whether the judgment of the state court violated federal law, while in the latter

> **and when it fairly appears that the state court rested its decision primarily on federal law.**
>
> Id., citation omitted.

case the federal courts are reviewing whether the custody of the defendant violated federal law. Id. This Court further observed, however, that:

> **Nonetheless, a state prisoner is in custody pursuant to a judgment. When a federal habeas court releases a prisoner held pursuant to a state court judgment that rests on an independent and adequate state ground, it renders ineffective the state rule just as completely as if this Court had reversed the state judgment on direct review. In such a case, the habeas court ignores the State's legitimate reasons for holding the prisoner.**

Id., emphasis in original, citation omitted. Based on this reasoning, this Court stated that Harris had correctly held that the "plain statement" rule and presumption of Long and Caldwell applied to habeas cases. Id. at 730-735. Moreover, this Court emphasized that the rule was to be applied equally and coextensively in all such cases:

> **It is unmistakably clear that Harris applies the same presumption in habeas that Long and Caldwell adopted in direct review cases in this Court. See Harris, 489 U.S., at 263, 109 S.Ct. ("Faced with a common problem we adopt a common solution"); see also id., at 264, 103 L Ed 2d 308, 109 S Ct 1038 ("Under our decision today, a state court need do nothing more to preclude habeas review than it must do to preclude direct review"). Indeed, the quoted passage purports to state the rule "on either direct or habeas review." Harris, being a federal habeas case, could not change the rule for direct review; the reference to both direct and habeas review makes plain that Harris applies precisely the same rule as Long.**

Id. at 736. Finally, however, the Court held that the presumption of "no independent state ground" did not apply in Coleman's case because it did not "fairly appear" from the state court decision that it rested primarily on federal law, or was interwoven with federal law. Id. at 735-740.[6] This Court thus held Coleman's claim to be procedurally defaulted and that Coleman had failed to show cause and prejudice for that default. Id. at 740-757.

The above decisions of this Court show that the adequate and independent state ground doctrine applies equally and coextensively in direct review and habeas cases, and that decisions in one area are fully applicable and relevant to the other area.[7] It must be concluded, therefore, that Ake v. Oklahoma,

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[6] Coleman failed to file a timely notice of appeal from his murder conviction and death sentence, and that was the sole basis for the state court's ruling denying Coleman's petition for appeal. Id. at 726-728.

[7] See e.g., Harris, supra, 489 U.S. at 257-266 and Coleman, supra, 501 U.S. at 737-740 (adopting and applying Long and Caldwell to habeas, Caldwell,

a direct review case concerning the independent state ground doctrine, is fully applicable and relevant to habeas cases, and that the Ninth Circuit therefore correctly relied upon and applied Ake to this case.

Consistently with the cases of this Court discussed above which hold that a state court's ruling on a constitutional claim must be independent of federal law to be an independent state ground, Ake holds that the state procedural rule relied upon by the state court in denying the claim must also be independent of federal law. Ake, supra, 470 U.S. at 74-75. Ake had contended in his capital sentencing proceedings that as an indigent he was entitled under the Due Process Clause to the expert assistance of a psychiatrist to counter the expert testimony of the State's psychiatrist that Ake was likely to be dangerous in the future. Id. at 70-74. The State heavily relied on that testimony to argue that Ake be sentenced to death, and the trial court imposed death. Id. at 73-74. On appeal, the court held that there was no constitutional error, and also held that the claim was waived on appeal under Oklahoma law because Ake had not repeated his request for an expert in his motion for new trial. Id. On direct review by this Court, the State argued that the Court of Appeals' finding of waiver was an independent state ground for the state court's decision. Id. at 74-75. This Court rejected that argument, however, because the state's waiver rule had an exception under Oklahoma case law for claims of "fundamental trial error," which included federal constitutional error. Id. This Court held that since Oklahoma's procedural rule required the state court to determine whether a federal constitutional error had occurred before it could apply the rule, it was not independent of federal law, and could not be used to establish an independent state ground for the denial of Ake's claim. Id. Accordingly, this Court held that Ake's claim was not subject to procedural default, and heard the merits of his claim and ruled in his favor. Id. at 74-87.

Ake is an essential component of the independent state ground doctrine. Without examination and consideration of the procedural rule that a state court relied upon in denying a federal claim, it is impossible to accurately determine whether the state's ruling on the federal claim was truly independent of federal law. This point is illustrated by Ake itself. This Court recognized that on its face, the state

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supra, 472 U.S. at 327 (relying on Ulster County); Sykes, supra, 433 U.S. at 86-87 (relying on Henry v. Mississippi); see also Victor v. Nebraska, 511 U.S. 1, 18-19 (1994) (relying on Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991)).

court's ruling that Ake's federal claim was waived under Oklahoma law was an independent state ground for denying the claim as it was a "state-law ruling." 470 U.S. at 74. However, when this Court examined the Oklahoma procedural rule applicable to Ake, it was able to determine that the state court's ruling was not, and could not be, independent of federal law, because:

> **[B]efore applying the waiver doctrine to a constitutional question, the state court must rule, either explicitly or implicitly, on the merits of the constitutional question.**

470 U.S. at 75, emphasis added. Thus, this Court held that "[d]espite the court's state-law ruling", id. at 74, emphasis added, the ruling was not an independent state ground because the state court was required to decide a federal question to determine whether the procedural rule applied to Ake's claim. The essential holding of Ake was, therefore, that since the Oklahoma procedural rule in question was not independent of federal law, any ruling by the state court based on that rule could never be independent of federal law, and could not constitute an independent state ground.

Based upon the above decisions of this Court, a federal court must conduct a two-step analysis to determine if there is an independent state ground for a state court's decision denying a federal claim. First, the court must determine, as a threshold matter, whether the applicable state procedural rule is independent of federal law. Ake, supra. If it is not, then the analysis need go no further, as any state court decision based upon that rule could not be independent of federal law. Id. If the procedural rule is independent of federal law, however, then the court must complete the second step, and determine whether the state court's ruling is independent of federal law. Harris v. Reed, Michigan v. Long, Caldwell v. Mississippi, supra. If it is independent, then the independent state ground doctrine applies and the constitutional claim cannot be reviewed by the federal court. If the ruling is not independent, however, then the federal court may review the claim. Id. Consideration of both the state rule under Ake, as well as the state ruling under Harris, is necessary to a fair and accurate determination of whether an independent state ground exists. Adoption of Petitioner's position that Ake should not apply in habeas proceedings would significantly undermine that doctrine, and weaken the authority and ability of the federal courts to review federal questions in habeas. This Court has clearly indicated in the cases discussed above that the independent state ground doctrine must be applied equally and coextensively in

direct review and habeas cases, and that Ake, should therefore have full application and relevance in a habeas case for purposes of the independent state ground doctrine. This Court recognized this in Harris v. Reed, supra, when it cited and referred to Ake "[f]or a discussion on whether a state procedural default ruling is 'independent'[.]" 489 U.S. at 260-261, n.6. In addition, in the habeas case of O'Dell v. Thompson, 502 U.S. 995 (1991), three Justices, including two present Justices of this Court, cited Ake in dissenting from a denial of a petition for writ of certiorari, stating that:

> **The Virginia Supreme Court's dismissal of O'Dell's habeas petition should not deprive a federal habeas court of jurisdiction. Under Ake v. Oklahoma, the Virginia Supreme Court's rejection [of O'Dell's claim] may not be based on an independent state ground because Tharp v. Commonwealth requires the Virginia Supreme Court to consider whether a constitutional right was abridged before denying an extension of time for filing a petition for appeal.**

502 U.S. at 997-998, citation and footnote omitted. These statements further support the conclusion that Ake applies in habeas cases.

For all of the foregoing reasons, the requirement of Ake v. Oklahoma, that a state procedural rule be independent of federal law in order to constitute an independent state ground for denial of a constitutional claim, is fully applicable and relevant in habeas proceedings, and the Ninth Circuit properly and correctly relied on Ake in Respondent's habeas proceedings to find that the Arizona courts' denial of Respondent's ineffectiveness claim was not based upon an independent state ground.

B

There Is No Actual Conflict In The Circuits On The Issue Of Whether The "Independent State Procedural Rule" Requirement Of Ake Applies To Habeas.

Like the Ninth Circuit's decision in this case, the overwhelming number of Court of Appeals cases and District Court cases recognize that Ake applies to habeas cases as well as direct review cases.

The Second,[8] Eighth,[9] Ninth,[10] and Eleventh[11] Circuits have all cited and relied on Ake in habeas proceedings. In addition, District Court habeas cases from the Third Circuit have cited and relied on Ake.[12]

Petitioner contends, however, that the Fourth Circuit is in conflict with the Ninth Circuit's decision in this case applying Ake in habeas proceedings, and requests this Court to resolve the conflict. (Pet. for Cert. at 9-13.) Petitioner's contention is incorrect. The only Fourth Circuit case cited by Petitioner is O'Dell v. Netherland, 95 F.3d 1214 (4th Cir. 1996). O'Dell involved the same Virginia notice of appeal rule at issue as in Coleman v. Thompson, supra, and the court stated that it agreed with the decision in Coleman that Ake "does not apply in the habeas context." O'Dell, 95 F.3d at 1244. It also held, however, as Coleman did, that the Virginia notice of appeal rule was independent of federal law, and that the petitioner's claim was therefore based on a independent state ground. Id. O'Dell does not support Petitioner's position for several reasons. First, it incorrectly concludes that this Court held in Coleman that Ake does not apply to habeas. As stated previously, the Court only stated in Coleman that it had not previously applied Ake in habeas proceedings, and that assuming arguendo that Ake did apply in habeas, the Virginia notice of appeal rule was in fact independent of federal law, thereby establishing an independent state ground. Coleman, supra, 501 U.S. at 741. Thus, Coleman's statement

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[8] Bradley v. Meachum, 918 F.2d 338, 343 (2nd Cir. 1990); Roy v. Coxon, 907 F.2d 385, 390-391 (2nd Cir. 1990).

[9] Malone v. Vasquez, 138 F.3d 711, 717-718 (8th Cir. 1998); see also Olesen v. Class, 962 F.Supp. 1556, 1570 (D.C.S.D.).

[10] Park v. California, 202 F.3d 1146, 1152 (9th Cir. 2000); Bargas v. Burns, 179 F.3d 1207, 1214 (9th Cir. 1999); Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1991); see also, McLain v. Hill, 52 F.Supp.2d 1133, 1138-1139 (C.D.Cal. 1999); Karis v. Vasquez, 828 F.Supp. 1449, 1461, n.16 (E.D.Cal. 1993).

[11] Spivey v. Head, 207 F.3d 1263, 1283 (11th Cir. 2000); Card v. Dugger, 911 F.2d 1494, 1517 (11th Cir. 1990).

[12] Banks v. Horn, 49 F.Supp.2d 400, 405-406 (M.D.Pa. 1999); Johnson v. Ellingsworth, 783 F.Supp. 215, 219-220 (D.Del. 1992).

Respondent was unable to find any cases from the First or Fifth Circuits helpful on this issue.

about Ake was dicta, and not a holding binding on the Fourth Circuit. Second, the Fourth Circuit's own "holding" in O'Dell that Ake does not apply in habeas is itself dicta, because the court held, as Coleman did, that Virginia's notice of appeal rule was independent of federal law, and did not need to reach the Ake question. Third, and most importantly, however, O'Dell's statement that Ake does not apply to habeas has not been followed by the Fourth Circuit in any subsequent decision, and all Fourth Circuit cases following O'Dell have ignored it and recognized that Ake applies in habeas cases.[13] It can hardly be argued by Petitioner that O'Dell is in conflict with the Ninth Circuit when O'Dell is not even followed in its own Circuit. O'Dell, therefore, is an aberration, and the other Fourth Circuit decisions cited above show that the Circuit does not follow O'Dell and does apply Ake in habeas cases.

Finally, Petitioner also contends that the Ninth Circuit's decision in this case also conflicts with cases of the Sixth, Seventh and Tenth Circuits. (Pet. for Cert. at 9-15.) This alleged conflict, however, is not based on whether Ake v. Oklahoma applies to habeas proceedings, and Petitioner concedes, as it must, that the Sixth, Seventh and Tenth Circuits, like the other Circuits mentioned previously, recognize the applicability of Ake to habeas cases. (Id. at 12.)[14] Petitioner contends, however, that these Circuits conflict with the Ninth Circuit's holding that a determination of whether a post-conviction claim in

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[13] Bacon v. Lee, 225 F.3d 470, 476 (4th Cir. 2000); Fisher v. Lee, 215 F.3d 438, 455 (4th Cir. 2000); Burket v. Angelone, 208 F.3d 172, 183 (4th Cir. 2000); Thomas v. Davis, 192 F.3d 445, 450 (4th Cir.1999); Yeatts v. Angelone 166 F.3d 255, 260 (4th Cir.1999); Fisher v. Angelone, 163 F.3d 835, 853 (4th Cir. 1998); Wright v. Angelone, 151 F.3d 151, 159 (4th Cir. 1998); Fitzgerald v. Greene, 150 F.3d 357, 366 (4th Cir. 1998); Boyd v. French, 147 F.3d 319, 331 (4th Cir. 1998); Williams v. French, 147 F.3d 203, 208-209 (4th Cir.1998); Gilbert v. Moore, 134 F.3d 642, 656 (4th Cir. 1998); Mu'Min v. Pruett, 125 F.3d 192, 196 (4th Cir. 1997); see also, Oken v. Nuth, 64 F.Supp.2d 488, 494 (D.Md. 1999).

[14] See Scott v. Mitchell, 209 F.3d 854, 865-868 (6th Cir. 2000); White v. Schotten, 201 F.3d 743, 751-752 (6th Cir. 2000); Willis v. Aiken, 8 F.3d 556, 567 (7th Cir. 1993); (questioning applicability of Ake but still determining whether state rule was independent of federal law); Duvall v. Reynolds, 139 F.3d 768, 796-797 (10th Cir. 1998); Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995); Brecheen v. Reynolds, 41 F.3d 1343, 1353 (10th Cir. 1996); Steele v. Young, 11 F.3d 1518, 1521-1522 (10th Cir. 1993); Andrews v. Deland, 943 F.2d 1162, 1188, n.40 (10th Cir. 1991); Gutierrez v. Moriarty, 922 F.2d 1464, 1468-1469 (10th Cir. 1991); Shafer v. Stratton, 906 F.2d 506, 509 (10th Cir. 1990); Brasier v Douglas, 815 F.2d 64, 65 (10th Cir. 1987); see also United States ex rel. Campos v. Peters, 827 F.Supp. 1359, 1362 (N.D.Ill. 1993).

Arizona is of "sufficient constitutional magnitude" under Rule 32.2(a)(3) is independent of federal law under Ake. This issue is discussed in the next subsection.

For the above reasons, the Petitioner's contention that there is a conflict in the Circuits on the issue of whether Ake applies to habeas cases is incorrect. Only one Fourth Circuit case, O'Dell v. Netherland, supra, has held that Ake does not apply to habeas cases. As stated above, however, that case has not been followed in the Fourth Circuit, and it therefore cannot fairly be said that O'Dell is the law of the Fourth Circuit. Thus, there is no real conflict in the Circuit Courts of Appeals on this issue, and the Petition should not be granted on this basis.

C

The Ninth Circuit Correctly Held That A Determination Of Whether A Post-Conviction Claim Is Of "Sufficient Constitutional Magnitude" Is Not Independent Of Federal Law, And That Holding Does Not Conflict With the Sixth, Seventh And Tenth Circuits.

The Ninth Circuit held that to determine whether a post-conviction claim is precluded under Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure, the Arizona state courts must first determine whether the claim is of "sufficient constitutional magnitude". Smith, supra, 241 F.3d at 1196-1197. The court also held that this determination is not independent of federal law, and is therefore not an independent state ground under Ake v. Oklahoma. Id. Petitioner contends, however, that the Ninth Circuit's decision conflicts with cases from the Sixth, Seventh and Tenth Circuits. (Pet. for Cert. at 11-15.) Petitioner's contention is incorrect.

The Sixth, Seventh and Tenth Circuit cases cited by Petitioner are all clearly distinguishable from this case because the state procedural rules at issue in those cases did not require a determination of federal law by the state court in order to apply the state procedural rule.

In Scott v. Mitchell, 209 F.3d 854 (6th Cir. 2000), the court considered whether an Ohio procedural rule requiring a contemporaneous objection to jury instructions at trial was independent of federal law under Ake. The petitioner argued that the rule was not independent, because under Ohio law the appellate court could overlook the rule for claims involving "plain error", which could include

constitutional error. 209 F.3d at 865-868. The court rejected this argument, however, because under Ohio law "plain error" review is discretionary, and only applies in "exceptional circumstances". Id. Since the state court decision did not give any indication that the court had exercised its discretion to review for plain error, and appeared to have decided the issue solely based on the procedural rule, the court held that the state court decision was independent of federal law under Ake. Id. Relying on Coleman v. Thompson, supra, the court stated that:

> **The Supreme Court...does not find the mere reservation of discretion to review for plain error in exceptional circumstances to constitute an application of federal law.**

209 F.3d at 868. Unlike the Ohio rule at issue in Scott, supra, Arizona's Rule 32.2(a)(3) is neither discretionary nor limited to "exceptional circumstances". Rather, it requires an Arizona court to consider the merits of every post-conviction claim presented and determine whether the claim is of "sufficient constitutional magnitude". Smith, 241 F.3d an at 1196-1197 n.6. If the claim is of "sufficient constitutional magnitude", it must be heard on the merits unless the State can prove the claim was knowingly, intelligently and voluntarily waived. Id. If the claim is not of "sufficient constitutional magnitude", then the claim may be subject to waiver and preclusion, Id Like the "fundamental trial error" procedural rule in Ake, application of Rule 32.2(a)(3) depends upon an "antecedent ruling on federal law" and is not independent of federal law. Ake, supra, 470 U.S. at 75. Contrary to Petitioner's contention, therefore, Scott is not in conflict with the Ninth Circuit's decision in this case.

In Paprocki v. Foltz, 869 F.2d 281 (6th Cir. 1989), a case relied upon by the court in Scott v. Mitchell, supra, the court held that the petitioner's claim, that a self-defense instruction used in his trial was unconstitutional, was subject to procedural default as a result of his failure to object to the instruction at trial, as required by a Michigan procedural rule requiring contemporaneous objection. 869 F.2d at 284-285. The petitioner argued that the claim should not be defaulted, however, because the Michigan Court of Appeals, in denying the claim, reviewed the claim for "manifest injustice", and thereby addressed the merits of the claim and waived the procedural bar. Id. The court rejected this argument, however, holding that under Michigan law, the Court of Appeals' procedural rule on appeal for an unobjected-to claim:

was to enforce the procedural bar while reserving the right to excuse it if necessary to prevent manifest injustice.

869 F.2d at 285, emphasis added. The court held that:

> **[...w]e do not believe that the state court's explanation of why the jury instructions resulted in no manifest injustice can fairly be said to have constituted a waiver of the procedural default.**

Id. Like Scott, supra, the procedural rule at issue in Paprocki did not require the Michigan Court of Appeals to review the merits of the petitioner's claim. Since the error was not objected to, the court could, in its discretion, review the merits of the claim for "manifest injustice". As the court held in Scott, supra, relying on Coleman, supra, the mere reservation of discretion to review for manifest injustice is not a determination of federal law under Ake, 209 F.3d at 868. In this case, however, and as held by the Ninth Circuit, Arizona courts are required to review a post-conviction claim for its "constitutional magnitude" in order to determine whether the claim is precluded under Rule 32.2(a)(3). Thus, the Michigan procedural rule in Paprocki, supra, was independent of federal law under Ake, while Rule 32.2(a)(3) is not independent under Ake.

In Willis v. Aiken, 8 F.3d 556, 559-567 (7th Cir. 1993), the court held that the petitioner's claim that a jury instruction was unconstitutional was procedurally defaulted due to his failure to comply with an Indiana procedural rule requiring a contemporaneous objection at trial. Because there was no objection to the instruction, the Indiana appellate courts were permitted under Indiana law to review the claim only for "fundamental error." Id. at 560. On appeal, the court held that the instruction was not "fundamental error", citing only Indiana law. Id. The petitioner argued in federal habeas that the claim should not be held to be procedurally defaulted, because the state court's "fundamental error" review required a review for constitutional error, and that review was therefore not independent of federal law. The Seventh Circuit rejected this argument, however, because it found that Indiana law does not equate "fundamental error" with "federal constitutional error". Id. at 562-569. Rather, it found that Indiana law mandates review for "fundamental error" only when the denial of a fundamental right "gives rise to a question of fundamental error as defined by state law". Id. at 567, emphasis in original, quoting Gutierrez v. Moriarty, 922 F.2d 1464, 1469 (10th Cir. 1991). The court therefore concluded that the Indiana

appellate court's finding of "no fundamental error" was an independent state ground. Id. Thus, Willis is also distinguishable from this case, as the procedural rule at issue there was discretionary, and did not require a determination of federal law in order to apply the rule. As the Ninth Circuit held in this case, however, application of Rule 32.2(a)(3) requires a determination of the "constitutional magnitude" of a post-conviction claim, and is therefore not independent of federal law. .

Finally, in Gutierrez v. Moriarty, 922 F.2d 1464 (10th Cir. 1991), relied on in Willis v. Aiken, supra, the court held the petitioner's claim that he was entitled to an evidentiary hearing in federal district court on constitutional violations relating to preindictment and pretrial delay was procedurally defaulted due to the petitioner's failure to raise those issues in the state trial court. 922 F.2d at 1468-1472. The New Mexico Supreme Court had held on appeal that the petitioner failed to preserve the claims for appellate review by failing to both raise the issue and offer a "proper quantum of proof" in the trial court. Id. at 1468. In habeas proceedings, petitioner argued that New Mexico has an exception to its waiver rule for claims involving "fundamental error". Id. The petitioner argued that the New Mexico Supreme Court had in fact considered the merits of his claims under this exception, as it referred to "quantum of proof", a substantive issue, and had cited a New Mexico case in which the court had reviewed the merits of a defaulted claim. Id. Petitioner thus argued that New Mexico's "fundamental error" rule was analogous to the "fundamental trial error" rule in Ake v. Oklahoma, supra. Id. The Tenth Circuit rejected this argument, however, as it found from examining New Mexico case law that New Mexico "does not equate fundamental error with federal constitutional error." Id. at 1469. Instead, it found that under New Mexico law a ruling by a state appellate court simply denying a claim, as in petitioner's case, did not "necessarily" mean that the court found no federal constitutional error, and could also mean that the court (i) considered the merits of the claim and found no "fundamental error" as defined under state law, (ii) found a violation of a "fundamental right", which under New Mexico is a "federal constitutional right", but declined to exercise its discretion to review the claim on its merits or (iii) found the error to be "fundamental error" but harmless, and treat the claim as a "fundamental right" claim and subject it to waiver. Id. Thus, the court held that the denial of the claim did not necessarily require a

determination of the merits of a federal constitutional claim, and that New Mexico's procedural rules were, unlike the procedural rule in Ake, independent of federal law. Id. Thus the court held that the New Mexico procedural rule was an independent state ground for the decision and that petitioner's claim was procedurally defaulted. Id. Again, Gutierrez is distinguishable from this case because it involved a procedural rule which was discretionary and did not require a determination of federal law to apply the procedural rule.

For the above reasons, Petitioner's contention that the Sixth, Seventh and Tenth Circuits are in conflict with the Ninth Circuit on the application of Ake v. Oklahoma is incorrect. The Ninth Circuit correctly applied Ake in this case and held that Rule 32.2(a)(3) requires Arizona courts to determine the merits of a post-conviction claim to determine whether it is a claim of "sufficient constitutional magnitude" and whether it is precluded under that rule. Smith, supra, 241 F.3d at 1196-1197. The Ninth Circuit also correctly held that Rule 32.2(a)(3) is not independent of federal law under Ake because a ruling under Rule 32.2(a)(3) "necessarily includes an evaluation of the constitutional stature of the claim" and "does not rest on an independent state ground". Id. at 1196-1197, n.6. As stated above, the Sixth, Seventh and Tenth Circuit cases relied upon by Petitioner are completely distinguishable from this case and Ake, because the state procedural rules in those cases were discretionary in nature, and did not make:

> **'Application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed'.**

Smith. Id. at 1196, quoting Ake, 470 U.S. at 75.

For all of the above reasons, Respondent requests this Court to deny the writ as to Petitioner's first Question Presented For Review.

II

A

The Ninth Circuit Did Not Misinterpret Rule 32.2(a)(3) And Arizona Law In Finding That Application Of The Rule Requires A Determination Of the "Constitutional Magnitude" Of A Post-Conviction Claim.

The Ninth Circuit found, after an examination of Rule 32.2(a)(3), the Comment to that Rule, and case law relating to the Rule,[15] that an Arizona court is required to determine whether a post-conviction claim is of "sufficient constitutional magnitude" in order to determine whether the claim should be heard on the merits or precluded under Rule 32.2(a)(3). Smith v. Stewart, supra, 241 F.3d at 1196-1197. The court explained the Rule as follows:

> **The Arizona Supreme Court's 1992 comment to Rule 32.2(a)(3) makes clear that the application of the amended procedural default rule requires a separate examination of a claim's constitutional magnitude. The comment provides, in pertinent part, that "[i]f an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant knowingly, voluntarily and intelligently waived the claim. Ariz.R.Crim.Pro. 32.2(a)(3) comment (West 2000). Thus, since 1992, Arizona's procedural default rule applies in two circumstances: first, when a claim is of insufficient constitutional magnitude and was forfeited at trial, on appeal, or in any previous proceeding; second, when a claim is of sufficient constitutional magnitude and the State proves that the person seeking relief knowingly, voluntarily, and intelligently waived it at trial, on appeal, or in any previous proceeding. In both cases, the state court must consider the nature of the claim before finding that the petitioner procedurally defaulted it. Because an Arizona procedural ruling in this context necessarily includes an evaluation of the constitutional stature of the claim, it does not rest on an independent state ground.**

Id. at 1197, n.6. The court thus held that under Rule 32.2(a)(3) claims of "sufficient constitutional magnitude" are an "exception" to preclusion under that Rule. Id. at 1197.

Petitioner contends, however, relying on State v. Espinosa, 29 P.3d 278 (App. 2001), that the Ninth Circuit's analysis of Rule 32.2(a)(3) is erroneous, that the Rule does not contain an exception for claims of "sufficient constitutional magnitude", and that the Rule does not require Arizona courts to determine the "constitutional magnitude" of a claim in order to apply Rule 32.2(a)(3). (Pet. for Cert. at 17-24.) Petitioner contends instead that Rule 32.2(a)(3) contains an exception, not for claims of "sufficient constitutional magnitude", but for a "narrow category of constitutional rights"[16], which are

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[15] See State v. Curtis, 912 P.2d 1341, 1344 (Ariz. App. 1995); State v. French, 7 P.3d 128, 130-131 (Ariz. App. 2000).

[16] Petitioner has placed the phrase "narrow category of constitutional rights" in quotation marks in the Petition, but has not cited what source or authority the phrase comes from. (Pet. for Cert. at 22.) If there is a source for this quoted phrase, Petitioner should provide it to Respondent, since Petitioner is relying on this phrase to support its position.

only those constitutional rights which require a defendant's "personal knowledge" to waive the right, and which the attorney may not waive for the defendant. (Id.) According to Petitioner, therefore, the only claims which are excepted from preclusion under Rule 32.2(a)(3) are those involving the right to counsel, the right to plead not guilty, the right to a trial by jury, and the right to be present at trial, all of which rights can only be waived by the defendant, and not the attorney. (Id.)

Petitioner's interpretation of Rule 32.2(a)(3) is incorrect, and is based entirely upon a misinterpretation of the following sentence in the Comment to the Rule; which Petitioner cites, emphasizes and relies on for its interpretation:

> **[...S]ome issues not raised at trial, on appeal, or in a previous collateral proceeding may be deemed waived without considering the defendant's personal knowledge, unless such knowledge is specifically required to waive the constitutional right involved.**

(Pet. for Cert. at 21, emphasis in original). Based upon this sentence, Petitioner contends that:

> **Read in context, the reference in the Comment to claims of "sufficient constitutional magnitude" does not recognize or establish any general exception to Arizona's rules of preclusion. The Comment merely acknowledges that Arizona's rules of preclusion will not bar a claim involving a narrow category of rights absent an on-the-record personal waiver by the defendant.**

(Id. at 22, emphasis added.) This argument shows that Petitioner has misread the above sentence in the Comment. That sentence does not state, as Petitioner claims, that only constitutional rights requiring a personal waiver by the defendant are excepted from preclusion under Rule 32.2(a)(3). What the sentence actually states that a post-conviction claim which is not of "sufficient constitutional magnitude" may generally be waived by the defendant's counsel without the defendant's knowledge and personal waiver, unless a personal waiver is "specifically required" to waive that specific constitutional right. Petitioner has misread and misconstrued the Comment in contending that all claims except those involving constitutional rights requiring a personal waiver are precluded under Rule 32.2(a)(3). Moreover, Petitioner's construction of the Rule and Comment essentially renders the portion of the Comment referring to claims of "sufficient constitutional magnitude" meaningless and superfluous, and the Rule and Comment may not be interpreted in such a manner. The Ninth Circuit's analysis of Rule 32.2(a)(3) is reasonable and correct, and is supported by the Arizona case law relied upon by the court. See State

v. Curtis, supra, 912 P.2d at 1345 ("A claim is precluded that could have been, but was not, raised in a prior appeal or PCR, unless the asserted claim is of sufficient constitutional magnitude" citing Comment). Moreover, even assuming, arguendo, that Petitioner's interpretation is correct, and that only claims involving constitutional rights for which a personal waiver is required are not precluded under Rule 32.2(a)(3), the Rule would still not be independent of federal law under Ake v. Oklahoma, supra. To determine whether a claim was subject to preclusion under Petitioner's interpretation of Rule 32.2(a)(3) an Arizona court would be required to make the following determinations before it could decide whether to hear the claim on the merits or preclude the claim under the rule: (i) whether the claim presented involved the violation of a federal constitutional right, (ii) whether the constitutional right was one which requires personal knowledge and waiver by a defendant and (iii) whether the defendant in fact previously made a personal waiver of the constitutional right. All of the above preliminary determinations would be necessary for an Arizona court to be able to apply preclusion under Rule 32.2(a)(3), and all of these determinations are "antecedent ruling[s] on federal law" on which the application of Rule 32.2(a)(3) depends. Ake, supra, 470 U.S. at 75. Thus, even under Petitioner's reading of Rule 32.2(a)(3) and its Comment, preclusion under Rule 32.2(a)(3) would not constitute an independent state ground for denial of a constitutional claim under that Rule. Ake, supra.

Finally, Petitioner's reliance on State v. Espinosa, supra, a decision of Division Two of the Arizona Court of Appeals, decided after the Ninth Circuit's ruling in this case, is misplaced because that decision conflicts with State v. French, supra, a prior decision of that court. In French, the defendant brought a post-conviction claim of ineffective assistance of counsel based upon his trial counsel's failure to request an alibi instruction. French, supra, 7 P.3d at 129-130. The State argued that the claim was precluded under Rule 32.2(a)(3) because the defendant failed to raise the claim in a previous Rule 32 Petition. Id. The defendant argued, however, based on the Comment to Rule 32.2(a)(3), that his claim was of "sufficient constitutional magnitude" to be heard on the merits and not precluded, and that he had not knowingly, intelligently and voluntarily waived the claim. Id. at 130. Relying on State v. Curtis, supra, a decision of Division One of the Arizona Court of Appeals, the court held that the ineffectiveness

claim was not of "sufficient constitutional magnitude" to avoid the preclusive effect of Rule 32.2(a)(3), and that the defendant had waived the claim by failing to raise it in his prior Rule 32 Petition. Id. at 130-131.[17] In so holding, the court examined the merits of the claim, and found, in essence, that any error was harmless due to the "ample evidence" supporting the conviction. 7 P.3d at 131.[18] Based on its review of the merits of the claim, therefore, the court held that trial counsel's failure to request an alibi instruction was not "so egregious" that it could not be precluded under Rule 32.2(a)(3). Id. at 130.

Thus, State v. French and State v. Curtis both clearly support the Ninth Circuit's conclusion in this case that under Rule 32.2(a)(3), a trial court must examine a post-conviction claim on its merits to determine if it is of "sufficient constitutional magnitude" that it cannot be precluded under that Rule. Inexplicably, however, just over a year after Division Two decided State v. French, it decided State v. Espinosa, supra, which appears to hold that the determination of whether a claim is of "sufficient constitutional magnitude" under the Comment to Rule 32.2(a)(3) is based upon whether the constitutional

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[17] In State v. Curtis, supra, the court held that the defendant's post-conviction claim that an alibi instruction was unconstitutional was not of sufficient constitutional magnitude", within the meaning of that term in the Comment to Rule 32.2(a)(3), and was therefore precluded under that Rule due to his failure to raise it in his appeal and prior Rule 32 Petition. Curtis, 912 P.2d at 1344-1345. The court held that:

> **A claim is precluded that could have been, but was not, raised in a prior appeal or PCR, unless the "asserted claim is of sufficient constitutional magnitude." Comment to Rule 32.2(a)(3)(Supp. 1994). We need not examine whether the standard alibi instruction could be better worded. At the time of the first appeal, the court not only reviewed the issues petitioner had raised, but also reviewed for fundamental error and found none. This review necessarily extended to the jury instructions. Petitioner's belated focus on the alibi instruction lacks sufficient constitutional magnitude to review an issue that he had two full opportunities to raise before. The trial court properly found this issue precluded by Rule 32.2(a)(3).**

Id. at 1344.

[18] The court relied on the victim's identification of the defendant, and a witness who saw part of the attack on the victim and provided a description of the car and license plate number of the car driven by the perpetrator which matched the defendant's car. 7 P.3d at 131.

right on which the claim is based is a right which must be "personally and expressly waived" by a defendant in order for waiver to occur. Espinosa, 29 P.3d at 280. The court stated that such rights would include the right to a jury trial and right to counsel. Id. Based upon this standard, the court held that the defendant's post-conviction claim that a plea agreement was unconstitutionally withdrawn by the State was not of "sufficient constitutional magnitude" to avoid preclusion because it was not:

> **such "'an inherently personal right of fundamental importance'" that it must be personally and expressly waived.**

Id. citing State v. Smith, 4 P.3d 388, 393 (Ariz. App. 1999) quoting Winters v. Cook, 489 F.2d 174, 178 (5th Cir. 1973).

Contrary to Petitioner's contention, State v. Espinosa is not a valid basis for questioning the decision of the Ninth Circuit in this case. First, and for the reasons stated previously, Espinosa's reading of Rule 32.2(a)(3) and its Comment is unreasonable and incorrect, as there is nothing in either Rule 32.2(a)(3) or its Comment which supports its conclusion that the standard for preclusion under Rule 32.2(a)(3) is whether a constitutional right can be personally waived. Second, Espinosa does not even mention, much less follow, State v. Curtis, and State v. French, supra, the latter of which was a case from its own Division, and relies on cases which have nothing to do with preclusion. A decision concerning a state procedural rule which disregards and ignores prior relevant and applicable case law concerning the rule cannot be used as a basis for a procedural default, as procedural default can only be justified when the State court correctly follows an established state procedural rule which is consistently and regularly applied and enforced. Rule 32.2(a)(3), as unreasonably and incorrectly interpreted by State v. Espinosa, is not the procedural rule applicable to this case. Rule 32.2(a)(3), as explained in its Comment, State v. Curtis and State v. French, is the applicable state procedural rule here, and the Ninth Circuit correctly based its decision on that Rule. State v. Espinosa did not establish a procedural rule. It simply failed to follow the procedural rule existing at the time of the decision, and therefore cannot be the basis for a procedural default. Finally, and as stated previously, even if Espinosa were the standard for preclusion under Rule 32.2(a)(3), that would not change the result in this case, as an Arizona court would still be required to make an "antecedent ruling on federal law" in order to apply Rule 32.2(a)(3),

32.2(a)(3), and that Rule would therefore still not constitute an independent state ground under Ake. For all of the above reasons, Petitioner's contention that State v. Espinosa is applicable to this issue is incorrect.

B

The Ninth Circuit Correctly Held That The Arizona Courts Did Not Clearly And Explicitly Rely On A Procedural Bar In Denying Respondent's Ineffectiveness Claim, And That There Was Therefore No Independent State Ground For Denial Of The Claim

In addition to holding that Rule 32.2(a)(3) itself was not an "independent state procedural rule" under Ake, and therefore not an independent state ground for the denial of Respondent's ineffectiveness claim, the Ninth Circuit alternatively held that the Arizona trial court's ruling on the claim was not an independent state ground, because in that ruling the court did not "clearly and expl...tly" rely on a state procedural rule in denying the claim. Smith, supra, 241 F.3d at 1197. Petitioner contends, however, that the Arizona trial court clearly relied on a procedural bar in its ruling denying the claim, and that the Ninth Circuit erred in holding therefore that the ruling was not an independent state ground for the denial of Respondent's claim. (Pet. for Cert. at 15-16.) Petitioner's contention is incorrect for two reasons.

First, it is not necessary to determine whether the Arizona court relied on a procedural bar in its ruling. As stated previously, if a state procedural rule is not independent of federal law, then a court's ruling based on that Rule can never be independent of federal law assuming that the state court follows the rule, which it must. It was for this reason that this Court held in Ake v. Oklahoma that there was no independent state ground for the Oklahoma court's denial of Ake's claim, "[d]espite the court's state-law ruling", because under the rule the "state court must rule, explicitly or implicitly, on the merits of the constitutional question." Ake, supra, 470 U.S. at 74-75, emphasis added. Thus, since Rule 32.2(a)(3) is not independent of federal law, and since we must assume that the Arizona courts followed that Rule in this case, the trial court's ruling denying Respondent's ineffectiveness claim could never be an independent state ground. Based on Ake it is therefore unnecessary to determine whether the court relied on a procedural bar in its ruling denying the claim.

Second, the Order does not contain an independent state ground under the principles of Coleman, Harris, Long, and Caldwell, supra. The Ninth Circuit correctly held that it was "unclear" from the trial court's last order denying Respondent's claim[19] whether the court was invoking a procedural bar. 243 F.3d at 1195-1197. The Order does not cite Rule 32.2(a)(3) or any of its provisions. (App. H.) Moreover, any procedural ruling is "interwoven " with federal law. Long, supra, 463 U.S. at 1040-1041. The text of the ruling rejects Respondent's argument that the attorneys of the Pima County Public Defender intentionally stayed on the case so that they would not have to allege that one of their attorneys was ineffective. (Appendix H.) Based on this premise, the court's ruling, in essence, was that if Respondent had a colorable claim of ineffectiveness his counsel would have withdrawn from the case so that he could raise it. (Id.) Thus, the gist of the ruling is that Respondent does not have a colorable claim of ineffective assistance of counsel. (Id.) The ruling is therefore really a ruling denying Respondent's constitutional claim on the merits. To the extent that any procedural aspects of the case are discussed in the ruling, they are thoroughly "interwoven" with the merits issue of whether Respondent received ineffective assistance of counsel. Long, supra. Since any procedural issue is interwoven with the substantive claim of ineffectiveness, the presumption of Long, Caldwell, Harris and Coleman applies, and it must be presumed that there is no independent state ground for the decision. Since the presumption of "no independent state ground" applies, then the "plain statement" rule applies and the court must find that the ruling is not an independent state ground in the absence of a "plain statement" in the text of the ruling clearly and ambiguously relying on an independent state procedural rule. As stated above, the ruling does not state that the claim is precluded, and does not cite Rule 32.2(a)(3) or any other preclusion or waiver rule. In the absence of a plain statement in the ruling clearly and ambiguously relying on a state procedural rule to deny relief, there is no independent state ground for the Arizona courts denial of Respondent's claim, and the Ninth Circuit correctly held that the claim was not

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[19] It is the last reasoned state court decision denying a claim which must be examined in order to determine whether the denial of a claim was based on an independent state ground. Ylst v. Nunnemaker, supra, 501 U.S. at 802-803. Petitioner erroneously focuses on the trial court's first order denying the claim in contending that the trial court relied on a procedural bar.

procedurally defaulted. Id. Petitioner's contention that the Ninth Circuit erred in finding that the state court's ruling on the ineffectiveness claim did not procedurally bar this claim from habeas review is therefore incorrect. Id.

C

The Ninth Circuit Did Not Err In Refusing To Certify A Question Of Arizona Law To The Arizona Supreme Court.

Finally, Petitioner contends that the Ninth Circuit erred in refusing to certify a question of law to the Arizona Supreme Court concerning "any ambiguity or confusion over the meaning of Rule 32.2(a)(3)." (Pet. for Cert. at 25-27.) Petitioner's contention is incorrect. There may be some habeas cases where state law relevant to the case is so unclear or undefined that the certification of a state law question to the state court is necessary in order for constitutional claims to be decided. This case, however, is not one of those cases. The Ninth Circuit in this case examined Rule 32.2(a)(3), its Comment, and Arizona case law relevant to the rule and concluded that the Rule requires an Arizona court to determine whether the claim is of "sufficient constitutional magnitude" to be heard on the merits in post-conviction proceedings and not precluded under the Rule. This conclusion was reasonable and correct. Petitioner does not agree with this conclusion, however, and has reached the opposite conclusion i.e., that an Arizona court is not required to determine whether a claim is of "sufficient constitutional magnitude" in order to apply Rule 32.2(a)(3). Petitioner now requests that a certified question be presented to the Arizona Supreme Court concerning Rule 32.2(a)(3) and that the court's decision on the certified question become the law of this case. Respondent requests this Court to deny this request. Rule 32.2(a)(3) and the Comment to the Rule were issued by the Arizona Supreme Court and it was clear to the Ninth Circuit from the Rule and the Comment that the "constitutional magnitude" of a claim must be determined in order to apply Rule 32.2(a)(3). There is therefore no need for a certified question, as the Ninth Circuit, pursuant to its authority in habeas cases, had addressed the issue and reached a reasonable and correct conclusion concerning Rule 32.2(a)(3). Respondent therefore requests this Court to deny Petitioner's request to have a question certified to the Arizona Supreme Court on the meaning of Rule 32.2(a)(3)

III

Petitioner's Procedural Default Arguments In This Case Contradict The Claim It Is Making In Other Cases That It Has "Opted In" To Chapter 154 of the AEDPA, Which Contains A Statutory Default Rule Under Which Respondent Is Clearly Entitled To Review Of His Federal Constitutional Claims.

Prior to the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA"), the rule of procedural default in habeas corpus cases was "exclusively a matter of federal common law." Ortiz v. Stewart, 149 F.3d 923, 931 (9th Cir. 1998), cert. denied 526 U.S. 1123 (1999). See Wainwright v. Sykes, supra, 433 U.S. at 72, 100 n.2 (dissenting opinion of Justice Brennan).[20] "Chapter 154 of AEDPA codified a new default rule, applicable only to states that 'establish a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have ... become final for State law purposes.' 28 U.S.C. § 2261(b)". Ortiz, 149 F.3d at 931. The AEDPA default rule is set forth in 28 U.S.C. § 2264.

Respondent argued below through an Amicus Brief that the enactment of the AEDPA, and Petitioner's contention that it had "opted in" to AEDPA's Chapter 154, made Petitioner's arguments regarding common law procedural default inapplicable. Instead, Respondent argued, his entitlement to federal review should be measured by the standards of 28 U.S.C. § 2264. Ibid. Petitioner filed an Answering Brief opposing this argument. Under that section, Respondent is plainly entitled to federal review of his ineffective assistance claims, without regard to how, or even whether, those claims were raised in state court. That is because § 2264(a) allows federal review of claims never presented to state court, where "the failure to raise the claim is ... the result of State action in violation of the Constitution or laws of the United States ...." 28 U.S.C. § 2264(a) (emphasis added). Chapter 154 of the AEDPA itself is, of course, a "law of the United States," and one of its provisions is 28 U.S.C. §2261(d), which

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[20]From the time of its creation, it has been clear that the doctrine of procedural default is subject to amendment by Congress. See Wainwright v. Sykes, 433 U.S. 72, 100 n.2 (1977) (dissenting opinion of Justice Brennan).

provides:

> **No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.**

That provision, and §2261's other requirements for state post-conviction proceedings, were not followed in Respondent's case, as the same office that represented him at trial and an appeal represented him in state and federal post-conviction proceedings, and that resulted directly in the failure to challenge the effectiveness of trial counsel that is at issue here. Since Petitioner claims the benefits of Chapter 154, its failure to follow that provision in Respondent's case violated federal law. See Mississippi Protection and Advocacy System, Inc. v. Cotten, 929 F.2d 1054 (5th Cir. 1991)(where a state accepts federal benefits provided under specified conditions, state rules and regulations which violate those conditions are violative of federal law and invalid).

The Court of Appeals did not address this issue, presumably because it was bound by Circuit precedent holding that common law procedural default continued to apply in Arizona "[b]ecause Arizona ha[d] not finalized its procedures with respect to the appointment and compensation of counsel in post-conviction relief proceedings" and therefore was "not governed by Chapter 154." Ortiz v. Stewart, 149 F.3d at 931. However, on September 24, 2001, Petitioner prevailed in its argument to the Ninth Circuit that it has now "opted in" to Chapter 154. Spears v. Stewart, 2001 WL 111968 (9th Cir. filed September 24, 2001.)

That decision effectively moots the questions Petitioner is seeking to have reviewed in this case. At the least, if the decision in Spears stands, it means that any decision in this case will have little if any impact on future Arizona capital cases, which will be governed by §2264 rather than Sykes. In fact, Respondent would submit that it renders the common law default issues irrelevant in his case as well, because by its terms Chapter 154 applies to all cases involving capital sentences from a given state, or none: its applicability turns on whether "a State [has] establishe[d] by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for [providing] .... competent counsel

in State post-conviction proceedings" which is available "to all State prisoners under capital sentence ...." 28 U.S.C. § 2261(b) and (c) (emphasis added). A "mechanism" cannot be created, or function, only in a given case.

Nor can a State litigant properly make arguments regarding the nature and application of its laws in one case, and contrary arguments in another. See Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir.1990), cert. denied, 501 U.S. 1260 (1991). Arizona cannot have it both ways. It has long claimed to have the "mechanism" required by Chapter 154 in place, and to apply it to "all State prisoners under capital sentence." It has now prevailed on that claim in the Court of Appeals in Spears, supra, entitling it to "special rules favorable to the state party, but applicable only if the State meets certain conditions, including provision for appointment of post-conviction counsel in state proceedings." Lindh v. Murphy, 521 U.S. 320, 327 (1997). One of those rules is the default rule of 28 U.S.C. § 2261. Having invoked its benefits, Petitioner should be held to the terms of that rule, which make its arguments here moot and which separately entitle Petitioner to review of the merits of his federal constitutional claims.

CONCLUSION

For all of the foregoing reasons, Respondent requests this Court to deny the Writ.

RESPECTFULLY SUBMITTED this 26th day of September, 2001.

S. JONATHAN YOUNG
Attorney for Respondent

for ROBERT J. HIRSH
Attorney for Respondent

DATED: September 26, 2001

APPENDIX A

Smith v. Stewart, 241 F.3d 1191 (9th Cir. 2001)

APPENDIX A

[Filed March 6, 2001]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT DOUGLAS SMITH Petitioner-Appellant, v. TERRY STEWART, Director, Arizona Department of Corrections, Respondent-Appellee.	)	Nos. 96-99025, 96-99026 D.C. No. CV-87-234-TUC-RMB OPINION

Appeal from the United States District Court for the District of Arizona;
Richard M. Bilby, Chief Judge, Presiding. D.C. No. CV-87-234-TUC-RMB.

Argued and Submitted August 17, 2000 -- Pasadena, California

Before: WARREN J. FERGUSON, STEPHEN REINHARDT, DAVID R. THOMPSON, Circuit Judges.

COUNSEL

S. Jonathan Young, Tucson, Arizona; John F. Palumbo, Law Offices Pima County Public Defender, Tucson, Arizona, for the petitioner-appellant.

Scott Bales, Solicitor General, Phoenix, Arizona, for the respondent-appellee.

FERGUSON, Circuit Judge:

Robert Douglas Smith ("Smith") appeals from the district court's dismissal of his habeas corpus petition on the ground of procedural default. He claims that his trial counsel failed to investigate his mental condition or to present adequate mitigating testimony during the sentencing phase of his trial, despite clear indications at the time of the presence of a mental disorder. We reverse the district court's ruling that federal habeas review is barred. Because Smith has made a colorable claim to relief, we order an evidentiary hearing in the district court.

I.

In March of 1982, Smith and accomplice Joe Leonard Lambright were convicted of sexual assault, kidnaping, and first-degree murder. [FN1] The principal witness against them at trial was another accomplice, Kathy Foreman ("Foreman"), who exchanged her testimony on the Government's behalf for freedom from prosecution.

> FN1. Because the facts of the offense are set forth in our en banc opinion, we do not repeat them here. *See Lambright v. Stewart*, 191 F.3d 1181, 1182-83 (9th Cir.1999) (en banc).

After the guilt phase of Smith's trial, the prosecution sought the death penalty on the theory that the murder had been committed in an especially heinous, cruel, or depraved manner under Ariz.Rev.Stat. Ann. § 13–703(F)(6). The government called Smith's former cellmate to the stand who, in seeking to reduce his own sentence, had told a criminal investigator that Smith laughed while fully confessing to the crime. When the government next called the investigator to testify about the conversation, she confirmed that Smith had described the crime to his cell-mate in exceptional detail, showed no remorse, and snickered throughout. In addition to presenting testimonial evidence, the prosecution displayed photographs of how the crime scene looked at night and during the day so that the court could fully grasp the victim's terror before she died.

Smith's counsel took less than a day to present the mitigating evidence he had gathered in support of sparing his client's life. Despite obvious indications that his client suffered from a mental disorder, the lawyer neither obtained nor presented any evidence of his psychiatric history and continuing mental impairment. He also failed to collect or present records relating to Smith's horrific childhood. Instead, his evidence consisted entirely of the testimony of Smith's mother-in-law and two sisters. Each witness was brief. Each offered only a general characterization of Smith as a nice and generous person who, along with his sisters, had grown up in an unstable household.

In closing argument, Smith's lawyer offered the court some reasons not to impose the death penalty. He opened by saying, "[f]irst of all, the most mitigating factor in the case is the fact that Kathy Foreman wasn't prosecuted at all." He made passing reference to Smith's "abusive childhood." Apparently believing that evidence of Smith's mental disorder might constitute a justification for the death penalty, the lawyer asserted:

> I'm told today by Jim Meyers there is a report from the hospital in Houston, which I haven't seen yet.... The reports I have are that he has problems with depression. He is a person of average intelligence. I don't know, and I'm making the statements on the reports I have seen so far, I would suggest that he doesn't have any major personality disorders and that he is not the type of person that needs to be, quote, eliminated.

***1194** Next, he asked the court to consider the *victim's family's* "great loss" in deciding Smith's punishment. He returned again to the government's failure to prosecute Foreman, spoke abstractly of his personal opposition to the death penalty, and promptly closed by saying, "[f]inally, again, I question how the Court could agree with the government, which is asking for the death penalty for Robert Smith, when it was the same government agency that chose to let Kat Foreman go without any prosecution at all... I don't think that's justice."

The state trial judge sentenced Smith to death. He rejected the lawyer's argument that Foreman's treatment at the government's hands warranted a lesser sentence for Smith because he did not "believe that any of the ramifications of her grant of immunity have diminished the moral, legal or ethical culpability or responsibility of either Mr. Smith or Mr. Lambright by any degree whatsoever." He justified his decision to impose death by stressing that, "I have, in fact, searched the record, the file, the pre-sentence report, my trial notes and recollections for any and all other factors which might conceivably mitigate your culpability for offenses of kidnaping and sexual assault and found none."

II.

The same office that represented Smith at trial continued to represent him unsuccessfully on appeal and in post-conviction proceedings. On direct appeal, the Arizona Supreme Court affirmed both Smith's conviction and sentence. *See State v. Smith*, 138 Ariz. 79, 673 P.2d 17 (Ariz.1983). Smith's counsel then filed a series of state and federal post-conviction petitions, none of which included an ineffective assistance of counsel claim, and all of which were denied.

After exhausting available state remedies, Smith's lawyer filed an amended federal petition for writ of habeas corpus. Soon after, District Judge Bilby received a letter from Smith himself, complaining that he had instructed his lawyer to raise a claim of ineffective assistance of counsel, but that his lawyer had failed to do so. In the letter, Smith wrote:

> My attorney says he can't rais[sic] or file the issue of enafective [sic] assistants [sic] of countsaling [sic] cause he is empoleed [sic] by the same office as the attorney that handeled [sic] my trial. I'm under the inpresstion [sic] from him that if all the issue [sic] is denied, that I could then get the courts to apoint [sic] me another attorney to file this issue for me, IS THIS TRUE? To my understandig [sic] from everyone I've ask [sic], wrote [sic] to tells [sic] me diffrant [sic] things. I've written Denise Young and ask [sic her about this, it took her a long time

> to respond cause she's so bissy [sic] and still did'nt [sic] answer my questions [sic]. Sorry to have to bother you with this but I feel this is a very inportant [sic] issue, Is'nt [sic] it also true that all issues has [sic] to be rased [sic] and filed at one time acording [sic] to the new apeals [sic] law passed a cuppall [sic] of year [sic] ago? I would like this court to know that I want this issue inclouded [sic] in my apeals [sic]. I would like take this to [sic] time to respectfuly [sic] ask this Honorable Court to apoint [sic] me a new FEDERAL ATTORNEY to work with my attorney Mr. John F. Palumbo at the PIMA COUNTY PUBLIC DEFENDERS OFFICE TUCSON AZ. if this is possible, if not, please apoint [sic] me new Federal Apeal [sic] ATTORNEYS. THANK YOU! very much for your concederation [sic], time and help with this matter.

Smith's counsel confirmed in an affidavit to the court that the claim had not been raised because his employer, a state agency, prohibited its lawyers from attacking each other's performance as a matter of policy.

In response to Smith's letter, the district court appointed a lawyer in private practice to litigate his claim of ineffective assistance of trial counsel. Smith then filed a state post-conviction petition alleging for the first time several instances of ineffective assistance at trial and sentencing, which the court dismissed as procedurally ***1195** barred. The federal district court also refused to adjudicate Smith's ineffective assistance of counsel claim on the ground that "the [state] trial court found the claims precluded as a matter of state law."

III.

[1] We review de novo a district court's decision to deny a petition for writ of habeas corpus. *See Mayfield v. Calderon*, 229 F.3d 895, 2000 WL 1514610, at * 4 (9th Cir. October 13, 2000).

IV.

Smith raised an ineffective assistance of counsel claim for the first time in his third state post-conviction petition. The state court dismissed the claim in October of 1995. Two months later, the state court revisited Smith's claim in an order denying his motion for reconsideration. In the order, the court wrote:

> Counsel's assertion on page 4, line 3 through 6 of his Motion for Rehearing, that "each of the deputies of the Public Defender's Office have been appointed ... to 'conduct the affairs' of the Pima County Public Defender's Office rather than to independently represent Mr. Smith" is either outrageous or ridiculous, whichever adjective is most appropriate. Deputies in the Public Defender's Office do not represent the Public Defender's Office. They are attorneys for and have an attorney-client relationship with the actual defendant charged with the crime. It may, indeed, be correct that it would be inappropriate for a public defender to allege a different public defender was ineffective at trial (although it has been done by this Public Defender's Office in the past). However, this does not absolve an attorney representing a client in an appellate matter from ineffective assistance of counsel. That is an absolute and undelegable duty. Failure to do so is at the very best malpractice and malfeasance. An attorney who discovers a colorable claim of ineffective assistance of counsel must immediately withdraw, notify the Court that there is such a claim, and allow the Court to appoint an attorney who has no conflict in representing that client. To suggest that one could wait for ten years, from 1985 to the present, and never even examine the case to see if the client had such a claim is an admission of the grossest malpractice.
>
> It is HEREBY ORDERED Defendant's Motion for Rehearing is denied.
>
> The claims are so old they are (1) precluded by failure to bring them previously, in accordance with Rule 32.2(a) and/or (2) for those claims raised under Rules 32.1(e), 32.1(f) or 32.1(g), are

summarily dismissed due to the petition's failure to set forth the reason for not raising such claims in a previous petition or in a timely manner, in accordance with Rule 32.2(b).

[2][3][4] We must determine whether the state court judgment in Smith's case bars federal review of his Sixth Amendment claim. *See Coleman v. Thompson*, 501 U.S. 722, 736, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). A state court's procedural ruling will bar our review only if its basis is separate and distinct from the federal question. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991); *see also Coleman*, 501 U.S. at 729–30, 111 S.Ct. 2546. [FN2] The State contends that the Arizona court's procedural default ruling in this case constitutes an independent state ground that bars us from reviewing Smith's ineffectiveness claim. [FN3]

FN2. To bar our review, a state's procedural default rule must also be adequate, which means that it is "strictly or regularly" followed. See *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988); *see also Hathorn v. Lovorn*, 457 U.S. 255, 263, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982). We have held that Arizona's procedural default rule is regularly followed in several cases. *See, e.g., Ortiz v. Stewart*, 149 F.3d 923, 931–32 (9th Cir.1998); *Poland v. Stewart*, 117 F.3d 1094, 1106 (9th Cir.1997).

FN3. "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750, 111 S.Ct. 2546. Because we conclude that the state court's ruling did not rest on an independent state ground, we do not address Smith's argument that the policy preventing employees from attacking the competency of any of the agency's lawyers constitutes cause

because it was an "objective factor" that was "external" to the petitioner and that "cannot fairly be attributed to him." *Id.*, 501 U.S. at 753, 111 S.Ct. 2546. We note however, that his argument appears to have merit under our recent decision in *Manning v. Foster*, 224 F.3d 1129, 1134 (9th Cir.2000), where we held that "a conflict of interest, independent of a claim of ineffective assistance of counsel ... constitute[s] cause where the conflict caused the attorney to interfere with the petitioner's right to pursue his habeas claim."

***1196** In *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the Supreme Court held that when a state's procedural default rule depends on an assessment of a federal claim, federal review is not barred. The state court in that case explicitly held that Ake had waived his federal constitutional claim by omitting it from his motion or a new trial. *Id.* at 74, 105 S.Ct. 1087. That court had ruled in another state case, however, that the waiver rule did not apply in cases of fundamental trial error. *Id.* By creating such an exception, "the State has made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed." The Supreme Court concluded that because "resolution of the state procedural law question depends on a federal constitutional ruling, the state- law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded." *Id.* at 75, 105 S.Ct. 1087.

We have similarly held that federal habeas review is not barred when a state makes the application of its default rule depend on a consideration of federal law. *See, e.g., Park v. California*, 202 F.3d 1146 (9th Cir.2000), *cert. denied*, — U.S. —, 121 S.Ct. 277, 148 L.Ed.2d 202 (2000); *McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir.1995); *Russell v. Rolfs*, 893 F.2d 1033, 1035–36 (9th Cir.1990). In *Park*, 202 F.3d at 1149, the state court refused to consider the petitioner's federal constitutional claim because he had failed to raise it on direct appeal. Despite the state court's explicit reliance on procedural default in its ruling, we held that Park's federal claim was cognizable in federal habeas corpus proceedings because the California

Supreme Court had held in another case that a petitioner could overcome the procedural bar if he could show a violation of "fundamental constitutional rights." Id. at 1152. As we explained, "in light of [the California Supreme Court's] acknowledgment that the constitutional error exception encompassed consideration by the court of the merits of federal constitutional questions, the California Supreme Court necessarily made an antecedent ruling on federal law before applying the [procedural] bar to any federal constitutional claims raised in Park's state habeas petition." *Id.* at 1153.

We also held in *McKenna v. McDaniel*, 65 F.3d at 1489, that a state court judgment explicitly invoking Nevada's procedural default rule as the basis for dismissing a post-conviction petition did not preclude federal review because the state court had explained in another case that it enjoyed the discretion to address errors of "constitutional dimension." We concluded that the existence of a discretionary exception in cases of constitutional dimension rendered the court's state-law procedural ruling "necessarily intertwined with its analysis of the merits of McKenna's constitutional claims and does not constitute a clear statement of independent and adequate state grounds for the decision." *Id.* at 1489.

It is unclear from the order denying rehearing of Smith's ineffective assistance of counsel claim whether the court invoked a procedural bar as the basis of its ruling. ***1197** The court suggested that Smith's lawyer would have raised an ineffective assistance of counsel claim if Smith had a colorable one. In other words, the court implied that the record failed to demonstrate that Smith had a colorable claim of ineffective assistance of counsel. Such a holding does not satisfy the requirement that a state court clearly and explicitly invoke a state procedural rule to bar federal habeas review.

Moreover, it is clear at the time of the state's procedural ruling, Arizona courts were required to consider the merits of a claim. Ariz. R.Crim. Pro. 32.2(a) generally bars a defendant from obtaining relief from his conviction on a ground that he waived at trial, on appeal, or in any previous collateral proceeding. [FN4] At the time of the state

court's procedural ruling, however, Arizona courts were required to examine the nature of a claim to determine whether the state's procedural default rule applied. *See State v. Curtis*, 185 Ariz. 112, 912 P.2d 1341, 1344 (Ct.App.1995); *see also State v. French*, 198 Ariz. 119, 7 P.3d 128, 130 (Ct.App.2000). Under Arizona's procedural default rule, "[a] claim is precluded that could have been, but was not, raised in a prior appeal or PCR, unless the asserted claim is of sufficient constitutional magnitude." *Curtis*, 912 P.2d at 1344 (internal quotation marks omitted). [FN5] Thus, Rule 32.2's procedural default rule applies where a petitioner's "belated focus" on an alleged error "lacks sufficient constitutional magnitude to revive an issue." *Id.* at 1344. [FN6]

FN4. Since 1992, Rule 32.2 provides, in pertinent part:
a. Preclusion. A defendant shall be precluded from relief under this rule based upon any ground:
(1) Still raisable on direct appeal under Rule 31 or on post-trial motion under Rule 24;
(2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding;
(3) That has been waived at trial, on appeal, or in any previous collateral proceeding.

FN5. Arizona's exception for overcoming procedural default in cases of constitutional dimension or egregiousness remains in effect. *See French*, 7 P.3d at 131 (applying the procedural default rule to petitioner's ineffectiveness claim because "[n]one of these omissions constitutes ineffectiveness so egregious and of such constitutional dimensions that it may not be precluded")

FN6. The Arizona Supreme Court's 1992 comment to rule 32.2(a)(3) makes clear that the application of the amended procedural default rule requires a separate examination of a claim's constitutional magnitude. The comment provides, in pertinent part, that "[i]f an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant

'knowingly, voluntarily and intelligently' waived the claim." Ariz. R.Crim. Pro. 32.2(a)(3) comment (West 2000). Thus, since 1992, Arizona's procedural default rule applies in two circumstances: first, when a claim is of insufficient constitutional magnitude and was forfeited at trial, on appeal, or in any previous proceeding; second, when a claim is of sufficient constitutional magnitude and the State proves that the person seeking relief knowingly, voluntarily, and intelligently waived it at trial, on appeal, or in any previous proceeding. In both cases, the state court must consider the nature of the claim before finding that the petitioner procedurally defaulted it. Because an Arizona procedural ruling in this context necessarily includes an evaluation of the constitutional stature of the claim, it does not rest on an independent state ground.

Given Arizona's exception for errors of "constitutional magnitude," the state court's finding of procedural default in Smith's case necessarily included an evaluation of the strength of his federal claim. Indeed, like the procedural rulings in *Ake*, *Park*, and *McKenna*, the state court's procedural ruling in this case was necessarily intertwined with its implicit determination that the merits of his claim were of insufficient constitutional magnitude. Thus, federal review is not barred.

V.

[5][6] Smith contends that he is entitled to an evidentiary hearing to develop his ineffective assistance of counsel claim. "In a capital case, a habeas petitioner who asserts a colorable claim to relief, and who ***1198** has never been given the opportunity to develop a factual record on that claim, is entitled to an evidentiary hearing in federal court." *Siripongs v. Calderon*, 35 F.3d 1308, 1310 (9th Cir.1994). [FN7] No court has given Smith an opportunity to develop a factual record on his Sixth Amendment claim.

FN7. In *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8-9, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992), the Supreme Court held that petitioners must show cause and prejudice for failing to develop

the material facts relating to a claim of ineffective assistance of counsel in state court. In his third Rule 32 petition, Smith attempted to develop the theory that his counsel provided ineffective assistance at sentencing. The court refused, however, to appoint a psychological expert to assist Smith in developing his argument. Despite Smith's attempt to have the court "consider his allegations of ineffective assistance," the court dismissed the claims without a hearing. Under these circumstances, Smith has satisfied the cause prong of *Tamayo-Reyes*. *See Jones v. Wood*, 114 F.3d 1002, 1012 (9th Cir.1997). The prejudice prong of *Tamayo-Reyes* is "coextensive with the prejudice prong of *Strickland*." *Correll*, 137 F.3d at 1414. For the reasons set forth below, we find that Smith has made a colorable claim of prejudice, and is therefore entitled to an evidentiary hearing on this question.

[7][8] To establish that his counsel was ineffective at sentencing, Smith must satisfy the standard the Supreme Court announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, he must show that his counsel's performance was deficient; that is, that it was "outside the wide range of professionally competent assistance." *Id.* at 690, 104 S.Ct. 2052. Although there is a strong presumption that an attorney's conduct meets the standard for effectiveness, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691, 104 S. Ct. 2052. In addition to demonstrating counsel's deficient performance, a petitioner must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," where a reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052; *see also Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1511-12, 146 L.Ed.2d 389 (2000).

[9] "It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir.1999), *cert. denied*, 527 U.S.

1049, 119 S.Ct. 2414, 144 L.Ed.2d 811 (1999). As the Supreme Court recently made clear, counsel's failure to investigate and present evidence of a person's mental impairment and social history constitutes deficient performance. *See Williams*, 120 S.Ct. at 1513-15 (concluding that counsel was deficient in failing to conduct an investigation that would have uncovered records describing a "nightmarish childhood" and borderline mental retardation); *see also Smith v. Stewart*, 189 F.3d 1004, 1008-09 (9th Cir.1999), *cert. denied*, — U.S. —, 121 S.Ct. 358, 148 L.Ed.2d 288 (2000) (No. 00-110); *Caro*, 165 F.3d at 1225; *Bean v. Calderon*, 163 F.3d 1073, 1080-81 (9th Cir.1998), *cert. denied*, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999); *Correll v. Stewart*, 137 F.3d 1404, 1412 (9th Cir.1998), *cert. denied*, 525 U.S. 996, 119 S.Ct. 465, 142 L.Ed.2d 418 (1998).

There can be no doubt that Smith has asserted a colorable claim to relief entitling him to an evidentiary hearing. Smith alleges that his lawyer failed to investigate, let alone present evidence of, his miserable childhood, mental disabilities, and mental impairment at the time of the offense. The thin transcript of Smith's sentencing hearing reveals that his lawyer offered only the brief testimony of three lay witnesses who gave merely a vague description of his personality and childhood. When the time came to argue to the court that Smith's life was worth sparing, his lawyer asserted that the best mitigating factor in the case was Foreman's immunity agreement. Inexplicably, he also suggested that the court consider "how ***1199** Sandra Owen's [the victim] family has sustained a great loss" in deciding whether Smith deserved to be put to death. The lawyer then offered a rambling explanation of his moral opposition to the death penalty and promptly returned to the State's failure to prosecute Foreman. This was a woefully inadequate presentation in support of saving Smith from a sentence of death.

If Smith's allegations are true, his counsel's failure to conduct any investigation is particularly egregious in light of indications at the time of trial of the presence of a mental disability. We have explained that, "where counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental condition as a mitigating factor in a penalty phase hearing, without a supporting

strategic reason, constitutes deficient performance." *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir.1995); *see also Smith v. Stewart*, 140 F.3d 1263, 1269 (9th Cir.1998) (concluding that counsel was deficient for failing to "perform any real investigation into mitigating circumstances, even though that evidence was rather near the surface"), *cert. denied*, 525 U.S. 929, 119 S.Ct. 336, 142 L.Ed.2d 277 (1998). This appears to be the case here. In a report assessing Smith's competency to stand trial, for example, Dr. Martin Levy noted that he had been hospitalized in a psychiatric unit and opined that, "Mr. Smith does have a history of psychiatric difficulties. Those difficulties have been primarily depressive in nature and have involved suicide attempts." Another report examining Smith's competency described him as "significantly anxious and depressed" and recommended further psychiatric evaluation.

The presentence report similarly signaled that Smith might have a mental disability. It noted that, as a child, Smith suffered from polio, a disease which can cause brain damage, and later underwent psychiatric treatment at a youth community mental health agency. It described Smith's numerous attempts to run away from his family beginning at age nine and his history of impulsive behavior. The report also revealed that Smith had used broken glass to cut through his skin and slash his veins in just one of several attempts to end his life. On another occasion, he shot himself in the stomach. Eventually, Smith began to abuse drugs, including LSD, marijuana, cocaine, psilocybin, heroin, PCP, and amphetamines. In conclusion, the report urged the court that, "[m]ental health counseling should be made available in the prison setting, keeping in mind that the defendant seems to be a high suicide risk." Rather than pursue an investigation, Smith's lawyers allegedly failed to develop any of this evidence, and in fact failed to either present argument relating to it or connecting it to any of Arizona's enumerated mitigating factors. We have previously found that the failure to present any argument based on a presentence report remarkably similar to the one in this case constituted deficient performance. *Smith*, 140 F.3d at 1269.

Smith alleges that his counsel would have uncovered substantial mitigating evidence if he had conducted an investigation. Smith has an IQ of 71, which is in the range of mental retardation. In a report prepared just two years after trial, moreover, Dr. David Gurland wrote that, "[i]n reviewing the data with regards to Mr. Smith, it becomes obvious that this is a man who is a marginally functioning individual who has been ever since his childhood." He noted that Smith was raised in a broken home and suffered both psychological and physical abuse. In commenting on his withdrawal from school in the eighth grade, Dr. Gurland wrote that, "[i]t is hard to know just how he managed to stay in school as long as he did." Smith's low I.Q. makes him "more of a follower than a leader. He is also easily influenced by others whom he may feel like him or admire him or want to be with him." Dr. Gurland concluded that the "patient should not, under the law, be given the death penalty as I think there are enough mitigating circumstances to, at worst, give him a life sentence." In addition to presenting ***1200** evidence that he suffered from a mental disorder, Smith also recounted to the district court that four inmates in a county jail took turns gang raping him when he was just eighteen years old. Smith's lawyer presented none of this powerful and potentially life-saving evidence at sentencing.

[10] Apart from allegedly failing to conduct any investigation into Smith's social and mental history, it appears from the transcript that his lawyer also failed to research the law on capital sentencing. In Arizona, a psychological disorder is a specifically enumerated mitigating circumstance. Ariz.Rev.Stat. § 13-703(G)(1). But when a report hinting at a possible mental impairment surfaced, Smith's lawyer minimized his client's mental disability and told the court, "I would suggest that he doesn't have any major personality disorders and that he is not the type of person that needs to be, quote, eliminated." It appears from this assertion that Smith's lawyer not only failed to recognize that a mental impairment could be mitigating, but also argued against his client's interests under the mistaken belief that the presence of a mental disorder was an aggravating factor. A misapprehension of the law that leads a lawyer to argue against his client's interests during the sentencing phase of a capital trial constitutes an "inadequac[y] in

rudimentary trial preparation and presentation" that falls outside the range of competent assistance. *Bean*, 163 F.3d at 1080; *see also Huynh v. King*, 95 F.3d 1052 (1996); *Scarpa v. DuBois*, 38 F.3d 1 (1st Cir.1994); *Morris v. California*, 966 F.2d 448, 454–55 (9th Cir.1991); *Blackburn v. Foitz*, 828 F.2d 1177 (6th Cir.1987). In short, Smith has presented a colorable claim of counsel's deficient performance.

Smith has, moreover, made a "colorable claim" that his counsel's deficient performance prejudiced him. The Supreme Court recently held that an attorney's failure to conduct an investigation into a petitioner's abusive childhood, borderline mental retardation, and prison record satisfied *Strickland*'s prejudice prong. *See Williams*, 120 S.Ct. at 1515. This was because, as the Court explained, "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.* at 1516; *see also Smith*, 189 F.3d at 1013 ("We previously have found Strickland's prejudice prong met where we concluded that defense counsel effectively presented no mitigating evidence at sentence, despite the presence of aggravating factors."); *Correll*, 137 F.3d at 1413 ("[B]ecause trial counsel failed to represent any evidence of Correll's purported mental illness which may have satisfied Ariz. Rev. St. § 13-703(E), Correll has 'undermined confidence in the outcome' of the sentencing, thereby establishing the requisite Strickland prejudice.") (quoting *Strickland*, 466 U.S. at 694-95, 104 S. Ct. 2052). Prejudice is especially likely where, as here, "this is not a case in which a death sentence was inevitable because of the enormity of the aggravating circumstances." *Bean* 163 F.3d at 1081; *see also Clabourne v. Lewis*, 64 F.3d 1373, 1387 (9th Cir.1995). In this case, the prosecution argued that only one aggravating factor existed. In response, Smith's lawyer not only allegedly failed to investigate his horrific childhood, mental retardation and possible brain damage, but also failed to do basic legal research. Smith has not only presented abundant evidence of deficient performance, but also of prejudice. There can be no question that he has satisfied the standard for obtaining an evidentiary hearing.

VI.

We reverse the judgment of the district court and remand for an evidentiary hearing. We remand so that the district court can determine whether Smith's allegations that his attorney neither investigated his mental condition nor presented adequate mitigating psychiatric testimony during the sentencing phase are true and, if so, *1201 whether he was denied effective assistance of counsel.

Concurrently herewith we file a memorandum disposition in which we affirm the petitioner's conviction and the district court's ruling that the especially heinous, atrocious, and cruel aggravating factor applies in this case for the reasons stated therein. Accordingly, the judgment below is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED for further proceedings consistent with this opinion.

APPENDIX B

Smith v. Lewis, Unpublished Order of District Court filed October 31, 1996 denying Supplemental Petition

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

[Filed Oct. 31, 1996]
Clerk, U.S. District Court
District of Arizona
By SMS Deputy

ROBERT DOUGLAS SMITH,	)	No. CIV 87-234-TUC-RMB
Petitioner,	)	
vs.	)	ORDER
SAMUEL E. LEWIS, et al.,	)	
Respondents.	)	

Before the Court is Petitioner Robert Douglas Smith's Supplemental Habeas Claim and Request For Expert Witness Fees. At issue is whether Smith's ineffective assistance counsel claims are procedurally barred with no exception available. Respondents move to deny the relief sought. After a review of the pleadings and record, the Court concludes that the claims are procedurally defaulted with no cause and prejudice shown. No fundamental miscarriage of justice will occur by the dismissal of this Petition.

Procedural Background

Smith was represented at trial by Thomas Hippert, an assistant public defender. A new assistant public defender, Lawrence Fleischman, represented Smith during his 1982 direct appeal. The Arizona Supreme Court affirmed Smith's conviction and death sentence. *State v. Smith*, 138 Ariz. 79, 86-87, 673 P.2d 17, 24-25

(1983), *cert. denied*, 465 U.S. 1074 (1984). In 1984, Fleischman field an petition for post-conviction relief pursuant to Rule 32, Arizona Rules of Criminal Procedure. One ineffective assistance of trial counsel claim was raised relating to Hippert's failure to object to the trial court's reliance on hearsay evidence in the presentence report. The trial court found the claim precluded under Rules 32.2(a)(2) and (a)(3), waived for lack of objection at the sentencing hearing and meritless for reasons detailed in its April 17, 1985 Minute Entry. The Arizona Supreme Court denied review without comment.

In 1989, assistant public defender, John Palumbo filed a second Rule 32 petition while simultaneously acting as Smith's attorney in his federal habeas petition. No claims of ineffective assistance of counsel were raised. All claims were found precluded. The Arizona Supreme Court again denied review without comment. The United States Supreme Court denied certiorari.

While briefing was being completed by Palumbo on Smith's federal habeas petition, the Court received a letter directly from Smith expressing his desire to raise an ineffective assistance of counsel claim. Because the Public Defender's Office had represented Smith at all stages of his litigation, the Court determined that this was an issue Arizona should address. Hence, the Court allowed Smith to pursue that claim in state court while simultaneously proceeding with the briefing of his other federal habeas claims before this Court. On September 5, 1996, the Court denied those claims but allowed Smith to supplement his petition with the ineffective assistance of counsel claims presented to the state courts.

The trial court dismissed Smith's third Rule 32 petition on October 24, 1995 and denied a motion for rehearing on December 20, 1995. The Arizona Supreme Court denied review without comment.

Discussion

First, Petitioner asserts his ineffective assistance of counsel claims are not procedurally barred because the state court ruled on the merits. The Court disagrees.

On October 24, 1995, the trial court ruled:

> This is defendant Smith's third Rule 32 petition from a sentence imposed on May 27, 1982 and affirmed by the Supreme Court on September 23, 1983.
>
> The Court has duly reviewed the petition, response, reply, files and records and, disregarding defects of form, it determines that no material issue of fact or law exists which would be served by any further proceedings. Therefore,
>
> IT IS ORDERED dismissing the petition.
>
> This order is based on the following findings:
>
> The suggestion that Lawrence Fleischman (now Judge Fleischman) or John Palumbo of the Public Defender's office failed to consider the issue of ineffective assistance of counsel or considered it, thought counsel was ineffective and failed to allege same to avoid embarrassing a professional colleague in violation of their ethical duties is outrageous.
>
> The claims are so old they are (1) *precluded by failure to bring them previously, in accordance with Rule 32.1(e), 32.1(f) or 32.1(g), are summarily dismissed due to the petition's failure to set forth the reason for not raising such claims in a previous petition or in a timely manner, in accordance with Rule 32.2(b).*

Minute entry dated October 24, 1995 (emphasis added). It is clear that the trial court found the claims precluded as a matter of state law.

Smith subsequently filed a motion for rehearing. It is this second minute entry which Smith asserts the trial court ruled on the merits of his claims thereby preserving them for federal habeas review. In denying the motion for rehearing, the state court found "The suggestion that Lawrence Fleischman (now Judge Fleischman) or John Palumbo of the Public Defender's office failed to consider the issue of ineffectiveness of counsel, or considered it, thought counsel ineffective and failed to allege same to avoid embarrassing a professional colleague in violation of their ethical duties is outrageous." Minute Entry of December 20, 1995. This language does nothing more than track the language of the October 24, 1995 minute entry. The language in both minute entries does nothing more than elaborate, albeit colorfully, why it dismissed Smith's third Rule 32 "due to the petition's failure to set forth the reason for not raising such claims in a previous petition or in a timely manner." Minute Entry of October 24, 1995. Smith's ineffective assistance of counsel claims were dismissed expressly for failing to conform the to the requirements of Arizona procedure. Accordingly, Smith's ineffective assistance of counsel claims are procedurally barred.

The Court may address the merits of the procedurally defaulted claims if Smith can show cause for the procedural default and actual prejudice therefrom. *Bonin v. Calderon*, 77 F.3d 1155 (9th Cir.), *cert. denied*, 116 S.Ct. 980 (1996); *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991). To demonstrate cause, Smith must show the existence of "some objective factor external to the defense [which] impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). A showing that the factual or legal basis for a claim was not reasonably available to counsel or some interference by officials making counsel's compliance with the state procedural rules impracticable would constitute cause. *Id.* Lacking cause and prejudice, the Court may nonetheless consider procedurally barred claims if failure to do so would result in the conviction or execution of "one who is actually innocent." *Schlup v. Delo*, ___ U.S. ___, ___, 115 S.Ct. 851, 864, 130 L.Ed.2d 808 (1995).

Smith contends that the following supports a finding of cause: (1) the Public Defender's failure or refusal to challenge the conduct of a member of its own staff; (2) the Public Defender's failure to investigate and present psychological evidence; and (3) the ineffectiveness of appellate counsel. The Court finds that these allegations do not establish cause. Because Hippert simply chose to pursue evidence that was readily available and did not present an available claim does not establish cause. *Carrier*, 477 U.S. at 486, 106 S.Ct. at 2644 (counsel's failure to recognize the factual or legal basis for a claim or failure to raise the claim despite recognizing it does not constitute cause). Similarly, attorney ignorance or inadvertence in failing to raise certain claims in his state appeal is not "cause". *Id.* at 488. Thus, the mere fact that Fleischman did not raise any ineffective assistance of counsel claims in the direct appeal is not cause. Moreover, in reviewing the merits of Smith's federal habeas petition, this Court found no constitutional error. *See* Amended Order of September 5, 1996. The Public Defender's Office would have had no basis to challenge the conduct of a member of its own staff who applied sound trial strategy or elected to pursue one claim over another.

The record also does not support a finding that Smith's execution would constitute a fundamental miscarriage of justice. To be actually innocent of the death penalty, Smith must show by clear and convincing evidence that no reasonable juror would have found him eligible for the death penalty. *Sawyer v. Whitley*, 505 U.S.333, ___, 112 S.Ct. 2514, 2523, 120 L.Ed.2d 269 (1992). The fundamental miscarriage of justice exception applies to the sentencing phase of a capital trial to one who is "actually innocent" of the death penalty. *Smith v. Murray*, 477 U.S. 527, 537-38, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986). A valid claim under this exception, however, is extremely rare. *Schlup*, 513 U.S. at ___, 115 S.Ct. at 864.

Today, Smith requests expert witness fees to allow him to be examined by a psychologist in order to demonstrate that he is actually innocent of the death penalty. He hopes to prove that such an examination will establish a single significant mitigating factor justifying the imposition of a life sentence. This request for a favorable hindsight evaluation is speculative. But more importantly, additional

mitigating evidence is not available to prove actual innocence for the death sentence under this exception. The actual innocence requirement focuses on the elements of eligibility, such as the existence of at least one aggravating factor, "and not on additional mitigating evidence which was prevented from being introduced as a result of claimed constitutional error." *Sawyer v. Whitley*, ___ U.S. at ___, 112 S.Ct. 2523. Thus, the Court agrees with Respondents that Smith offers nothing to rebut the presumption that he is eligible for Arizona's death penalty beyond a reasonable doubt and that the death sentence is appropriate in his case. *See State v. Smith*, 138 Ariz. 79, 86-86, 673 P.2d 17, 23-24 (1983).

Conclusion

IT IS ORDERED that Petitioner Robert Douglas Smith's Request for Expert Witness Fees is DENIED;

IT IS FURTHER ORDERED that Respondent's Motion to Deny Expert Witness Fees and to Dismiss all Supplemental Habeas Claims is GRANTED and Petitioner Robert Douglas Smith's Petition for Habeas Corpus is DENIED WITH PREJUDICE and hereby DISMISSED.

Dated this 30 day of October, 1996.

S/_____
Richard M. Bilby
Senior United States District Judge